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IN THE
Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

BRIEF FOR THE SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS 1

INTERESTS OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE PETITION 2

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER ANY FIRST AMENDMENT PROTECTIONS APPLY TO FRAUD ACTIONS BASED ON DISINTERESTED FINANCIAL NEWS AND COMMENTARY 2

A. The Court of Appeals' Holding That The First Amendment Does Not Apply To Fraud Actions Based On Disinterested Financial News And Commentary Is Contrary To *New York Times* And *Bose*. 4

B. Numerous Other Courts Of Appeals Have Held That First Amendment Protections Apply To Actions Based On Disinterested Financial News And Commentary. 11

TABLE OF CONTENTS
(continued)

Page

II. WHETHER THE FIRST AMENDMENT APPLIES TO FRAUD ACTIONS BASED ON DISINTERESTED FINANCIAL NEWS AND COMMENTARY IS AN IMPORTANT AND URGENT QUESTION 13

III. THE RESPONDENT IS NOT AIDED BY THE COMMERCIAL SPEECH DOCTRINE 17

CONCLUSION 22

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases

Associated Press v. United States,
326 U.S. 1 (1945) 2

Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655,
39 F.3d 191 (8th Cir. 1994) 11

Biospherics, Inc. v. Forbes, Inc.,
151 F.3d 180 (4th Cir. 1998) 18

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983) 18

Bose Corp. v. Consumers Union,
466 U.S. 485 (1984) 5, 6

Byrum v. Landreth,
566 F.3d 442 (5th Cir. 2009) 12

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 8

Commodity Trend Serv., Inc. v. CFTC,
233 F.3d 981 (7th Cir. 2000) 8

Compuware Corp. v. Moody's Investors Servs.,
499 F.3d 520 (6th Cir. 2007) 12

Dirks v. SEC,
463 U.S. 646 (1983) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Falanga v. State Bar,
150 F.3d 1333 (11th Cir. 1998) 12

FTC v. Brown & Williamson Tobacco Corp.,
778 F.2d 35 (D.C. Cir. 1985) 12

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 8

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 10

Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 5

Illinois ex rel. Madigan v. Telemarketing Associates,
538 U.S. 600 (2003) 9

Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.,
175 F.3d 848 (10th Cir. 1999) 12

Lane v. Random House,
985 F. Supp. 141 (D.D.C. 1995) 20

Lowe v. SEC,
472 U.S. 181 (1985) 18, 19

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

NAACP v. Button,
371 U.S. 415 (1963) 4

National Life Insurance Co. v. Phillips Publishing, Inc.,
793 F. Supp. 627 (D. Md. 1992) 20

Novartis Corp. v. FTC,
223 F.3d 783 (D.C. Cir. 2000) 12

Peel v. Attorney Registration & Disciplinary Commission,
496 U.S. 91 (1990) 6

Philip Morris v. United States,
566 F.3d 1095 (D.C. Cir. 2009) 12

Revo v. Disciplinary Bd. of the Sup. Ct.,
106 F.3d 929 (10th Cir. 1997) 12

Riley v. Nat'l Fed. of the Blind of N.C., Inc.,
487 U.S. 781 (1988) 20, 21

Schaumburg v. Citizens for Better Env't,
444 U.S. 620 (1980) 8

SEC v. Wall St. Publ'g Inst., Inc.,
851 F.2d 365 (2d Cir. 1988) 18

Time, Inc. v. Hill,
385 U.S. 374 (1967) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Unelko Corp. v. Rooney,
912 F.2d 1049 (9th Cir. 1990) 12

United States v. Stevens,
No. 08-769 (Apr. 20, 2010) 8

United States v. Wenger,
427 F.3d 840 (10th Cir. 2005) 19

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council,
425 U.S. 748 (1976) 18

Constitutional Provision

U.S. Const. amend. I 3

Statute

Securities Exchange Act of 1934 § 10(b) 10

Press Articles

Brian Bandell, *BankUnited CEO: Big Deal is Coming*, South Florida Business Journal, Nov. 10, 2009 15

Mara Der Hovanesian, *Nightmare Mortgages*, Business Week (Sept. 11, 2006) 16

Kris Maher & Ben Casselman, *Coal Giant Consol Is Latest To Buy Gas*, Wall St. J., Mar. 16, 2010 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Vivian Marino, *Trying to Gauge the REIT Rebound*, N.Y. Times, June 21, 2009 15

Serena Ng & Joann S. Lublin, *Benmosche Upbeat on AIG Prospects*, Wall St. J., Apr. 2, 2010 15

Steven Pearlstein, *At Constellation, Not a Star Performance*, Wash. Post, Apr. 24, 2009 15

Rick Rothacker & Patrick Scott, *Wachovia Eyed Big Buffett Investment*, Charlotte Observer, Oct. 16, 2008 15

Chris Roush, *Unheeded Warnings*, American Journalism Review (December/January 2009) 16

Dean Starkman, *Power Problem*, Columbia Journalism Review (May/June 2009) 16

Other Sources

2009 Pulitzer Prize Finalists, *available at* http://www.pulitzer.org/finalists/2009 15

James Madison's Report on the Virginia Resolutions (1800) 3

BRIEF FOR THE SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTERESTS OF *AMICUS CURIAE*

Amicus curiae Society of Professional Journalists ("SPJ") is a professional organization that includes broadcast, print, and online journalists. SPJ has more than 8,000 members and 250 local chapters. Among its members are numerous reporters dedicated to providing the public with financial news and commentary. For example, SPJ's secretary treasurer is a reporter for the *South Florida Business Journal* and its volunteer Foundation president is an editor for *Bloomberg News*. SPJ's members have no financial interest in the companies they cover—that is, they do not own or in any way facilitate the trading of securities in the companies on which they report or comment, nor do they owe any relevant fiduciary duty to investors.

In the decision below, a routine dispute between a source and a writer about what was said in a conversation supported a securities fraud verdict resulting in significant civil and injunctive penalties. As a

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amicus*'s intent to file this brief. All parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

result, the decision has called into doubt important First Amendment protections for disinterested financial news reporting and commentary, leaving journalists exposed to burdensome securities fraud litigation and the risk of harsh punishment. Left undisturbed, the decision below will inevitably and understandably cause a reduction in the amount of financial news and commentary available to the public.

REASONS FOR GRANTING THE PETITION

In this case, the Fourth Circuit sanctioned the use of securities fraud laws to circumvent First Amendment protections previously relied on by the financial news industry. The court of appeals' decision to render the First Amendment altogether irrelevant misconstrues this Court's precedents and is in sharp tension with numerous courts of appeals decisions. The decision below will inhibit the financial news and commentary that is so valued by consumers and professionals and so necessary to efficient operation of the markets. Review is warranted.

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER ANY FIRST AMENDMENT PROTECTIONS APPLY TO FRAUD ACTIONS BASED ON DISINTERESTED FINANCIAL NEWS AND COMMENTARY

The First Amendment prohibits certain restrictions on speech to assure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).[2] As James Madison stated, it

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[2] The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I.

is "to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression." Madison's Report on the Virginia Resolutions (1800), *reprinted in* 4 *Elliot's Debates* 571 (1836). Accordingly, all "formulae for the repression of expression"—such as laws against "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business"—"must be measured by standards that satisfy the First Amendment." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (footnotes omitted).

In this case, the Fourth Circuit has allowed the securities fraud laws to be used as a formula for the repression of expression: the publication of disinterested financial news and commentary has resulted in severe civil penalties and the prohibition of future speech based solely on a disagreement between a writer and his source. Petitioners wrote, promoted, and published a financial analysis that stated a representative of a public company had told the author to "watch the stock on May 22nd." Pet. App. 9a.[3] Petitioners did not own stock in the company and did not buy or sell stock for readers. The district court below concluded that the company representative in fact made no such statement regarding May 22 (Pet. App. 12a) and "inferred" that the petitioner "must have known" that his reporting was false. Pet. App. 19a. Based solely on this "false" fact (*see* Pet. App. 20a), the district court applied the securities laws to

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[3] The fraud action is based on two documents: the USEC Special Report, and the Super Insider Tip E-mail used to promote the Special Report. Pet. App. 7a.

impose significant financial and injunctive penalties on the publisher and author. *See* Pet. App. 4a. The court of appeals affirmed, holding that once the speech at issue was subjected to a suit for fraud, the Constitution became irrelevant. As it stated: "Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment." Pet. App. 49a.

The Fourth Circuit's reasoning is contrary to decisions of this Court and of the courts of appeals.

A. The Court of Appeals' Holding That The First Amendment Does Not Apply To Fraud Actions Based On Disinterested Financial News And Commentary Is Contrary To *New York Times* And *Bose*.

1. Because First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society," this Court has explained that they need "breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). That requires protecting statements that are erroneous because "erroneous statement[s are] inevitable in free debate, and [they] must be protected if the freedoms of expression are to have the 'breathing space' that 'they need to ... survive.'" *N.Y. Times*, 376 U.S. at 271-72 (quoting *Button*, 371 U.S. at 433). Thus, for example, in order to encourage discussions on matters of public concern, the law protects mistaken statements, acknowledging that "the advantages derived are so great that they more than counterbalance the inconvenience of private persons" who are injured by the erroneous speech in some way. *Id.* at 281.

In *New York Times*, the Court held that in light of the importance of open, even if erroneous, speech,

a statement about a public official could not give rise to a libel suit simply because it was offensive and false. 376 U.S. at 279-80. Rather, the speaker must have acted with actual malice—*i.e.*, intent or a reckless indifference to the truth. And the evidence that the speaker acted with actual malice may not be simply a preponderance, but must be clear and convincing—the highest possible in a civil suit.[4]

In addition, even if a district court finds these constitutional criteria are met, an appellate court must perform independent de novo review of the full record to determine whether a plaintiff bringing suit based on a statement has "demonstrate[d] with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *See Bose*, 466 U.S. at 511 n.30 (citing *N.Y. Times*, 376 U.S. at 280).

In *Bose*, this Court explained that "[t]he requirement of independent appellate review ... is a rule of federal constitutional law." 466 U.S. at 510. In that case, which concerned a defamation claim involving a corporation's product, the Court held that whether the evidence "is of the convincing clarity required to strip the utterance of First Amendment protection is

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[4] Cases subsequent to *New York Times* that the reasoning of that case applies to various other causes of action, not just libel. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), for example, the Court required a showing of actual malice on a state-law tort claim of intentional inflection of emotional dismiss for an offensive and allegedly false satiric cartoon. *Id.* at 56. This Court has also applied those standards to false light, *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967), and product disparagement, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 513 (1984).

not merely a question for the trier of fact." *Id.* at 511. Rather, the appellate court, "and particularly Members of this Court," *id.* at 510, "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* at 511.

The reasoning of *Bose* is not limited to suits labeled "libel," but applies to other cases in which a factual determination or application of law to fact will place communication inside or outside of a protected category. The *Bose* rule, the Court explained, "emerged from the exigency of deciding concrete cases." 466 U.S. at 510. Repeatedly, and in a variety of contexts, the Court has applied independent appellate review "in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Id.* at 503. In such cases, "the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." *Id.* at 505.[5]

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[5] Other decisions of this Court have applied the heightened constitutional requirements of *Bose* beyond the libel or defamation context. The Court's opinion in *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), is representative. That case concerned whether certain statements that qualified as commercial speech were misleading, and so outside the protection of the First Amendment. The Court confirmed that when the issue in a case is "[w]hether the inherent character of a statement places it beyond the protection of the First Amendment," then appellate courts "should exercise de novo review." *Id.* at 108.

These constitutional requirements of actual malice, established with clear and convincing evidence, and de novo appellate review ensure that speech has the breathing space demanded by the First Amendment. Even though these constitutional requirements may protect false speech, and thereby curtail the availability of libel claims to protect reputations, the First Amendment interests prevail.

2. The same rationales that led the Court to adopt the actual malice, clear and convincing evidence, and independent review protections in libel actions squarely apply to fraud actions based on disinterested financial speech. Varied opinions about a company's future prospects may serve to sharpen understanding of the company even if one of those opinions turns out, in time, to have been mistaken. Likewise, when publishers report competing or even inconsistent versions of an event, readers evaluate the reports and can come to a judgment about which report, combination of reports, or even a third report, is most likely to be accurate. So too, when a writer and source express different views about the contents of a conversation, the public is well able to assess which view is to be believed. Thus, a robust market in objective public speech about public companies necessarily includes speech that may turn out to be mistaken.

To be sure, when a party facilitates securities transactions of a public company or has a fiduciary relationship to an investor or public company, the risk of the party making false statements to inflate a company's prospects is particularly high. For that reason, the First Amendment does not constrain

every type of fraud suit.[6] But when the speaker has no financial interest in the securities transaction—and instead is a reporter or commentator discussing a public company, the interests weigh heavily in favor of protecting the speech.

Advancing First Amendment protections to those accused of securities fraud but who do not have an interest in the relevant securities is analogous to advancing First Amendment protections to those accused of libeling a public official. Libel suits have an important value: "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Similarly, fraud suits based on financial news and commentary promote a legitimate state interest in protecting the accuracy of information in the marketplace. Because of the societal benefits of libel suits, this Court has long included "libel" among "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (noting that these categories "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). So too, because of the societal benefits of fraud suits, this Court has long included "fraud" along with libel in the limited categories of punishable speech. *See United States v. Stevens*, No. 08-769, slip op. at 5 (Apr. 20, 2010). Nonetheless, under the First

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[6] *See, e.g., Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980) (collecting cases); *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 992 (7th Cir. 2000).

Amendment libel suits must meet certain constitutional thresholds. Even when speech satisfies the elements of a libel action, the Court will not "give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law." *N.Y. Times*, 376 U.S. at 280 (quoting *Button*, 371 U.S. at 429). So too, the Court should not "give any more weight to the epithet" "fraud" than the "libel" label. *See id.* (quotation omitted).

3. The court of appeals' decision illustrates the importance of assuring that the First Amendment protects disinterested financial speech.

The Fourth Circuit relied heavily on this Court's statement in *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600, 612 (2003), that "the First Amendment does not shield fraud" and so declared the First Amendment inapplicable. *Id.* But the Fourth Circuit ignored the crucial point of *Telemarketing*: that "[s]imply labeling an action one for 'fraud,' of course, will not carry the day." *Id.* at 617. In *Telemarketing*, the Illinois fraud law already satisfied *New York Times* because it required a finding, by "clear and convincing evidence," of a scienter standard "resembling actual malice." *Id.* at 620, 621 n.10. Thus, the Court did not need to address whether the First Amendment independently required those protections. *Id.* at 620-21 The Court still observed that independent review of the trial court's findings by an appellate court in the fraud context would serve "[a]s an additional safeguard responsive to First Amendment concerns." *Id.* at 621. The Court's praise of the application of *Bose* review demonstrates that constitutional requirements are relevant to fraud cases.

It is no answer to emphasize, as the Fourth Circuit does (Pet. App. 25a-30a), that petitioners benefited in some loose sense from the sale of securities of the company under discussion. Just as the libel suit against a public individual is not exempt from the First Amendment merely because a newspaper profits from selling editions containing libelous statements, the fraud suit based on disinterested financial information is not exempt from the First Amendment merely because the speaker in some abstract sense has an interest in the financial information. The type of interest in the company under discussion that the Fourth Circuit attributed to petitioners—*e.g.*, that increased stock prices could make their publications more popular—even if accurate is far too attenuated to affect the First Amendment calculation that favors protecting robust and sometimes mistaken public discourse regarding financial affairs.

The court of appeals' failure to consider the protections required by *New York Times* and *Bose* was determinative of the outcome of this case. Under § 10(b) of the Securities Exchange Act of 1934, the knowledge or recklessness required need only be proved by a preponderance of the evidence, not by clear and convincing evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). In contrast to the Illinois law in *Telemarketing*, § 10(b) does not contain the constitutional protections described in *New York Times*. Thus, unlike the defendants in *Telemarketing*, the defendants in this case were punished for speech on a matter of public concern using an evidentiary standard lower than that of *New York Times* and its progeny.

The securities fraud judgment here rests on the thinnest of reeds. After resolving based on competing trial testimony that the source did not tell the journalist a particular fact, the district court "inferred" that the petitioner "must have known" that his reporting was false, and the court of appeals simply affirmed on that basis. Pet. App. 19a. But had the higher standard of proof required by *New York Times* been applied here and had independent appellate review of factual issues been conducted, this judgment based on a dispute between source and publisher could not stand.[7]

B. Numerous Other Courts Of Appeals Have Held That First Amendment Protections Apply To Actions Based On Disinterested Financial News And Commentary.

Courts of appeals have applied the constitutional protections described in *New York Times* to causes of action based on financial commentary. As one court explained, "a plaintiff may not avoid the protection afforded by the Constitution ... merely by the use of creative pleading." *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (applying *New York Times* protections to state-law "tortious interference" claim).

Following that reasoning, courts of appeals have applied the *New York Times* requirements to various

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[7] Because the failure to apply First Amendment protections determined the outcome below, this case presents a particularly appropriate vehicle for the Court to address the role of the First Amendment in protecting financial news publishers and writers.

suits involving allegedly false financial news and commentary. *See, e.g., Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999) (state-law intentional interference with prospective business relations claim related to securities); *Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 531 (6th Cir. 2007) (breach of contract claim based on reports about a public corporation by a financial ratings company); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990).

So too, numerous courts of appeals have followed *Bose* and applied independent review to determine whether speech falls within protected categories. These courts have conducted "an independent examination of the whole record in order to make sure that the speech regulation does not constitute a forbidden intrusion on the field of free expression." *Revo v. Disciplinary Bd. of the Sup. Ct.*, 106 F.3d 929, 932 (10th Cir. 1997); *see also Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) ("Whether free speech rights have been infringed presents a mixed question of law and fact reviewed de novo"); *Falanga v. State Bar*, 150 F.3d 1333, 1335 (11th Cir. 1998) ("Where, as here, the parties to a First Amendment case dispute only the district court's findings of constitutional ... fact, our standard of review is de novo.").

In departing from these *Bose*-related precedents, the decision below deepens an existing circuit conflict. Like the Fourth Circuit below, the D.C. Circuit has declined to apply *Bose* review in these circumstances. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 & n.3 (1985); *Novartis Corp. v. FTC*, 223 F.3d 783, 787 n.4 (2000); *Philip Morris v.*

United States, 566 F.3d 1095, 1110 (2009). Petitions for certiorari are currently pending in *Philip Morris*, presenting the question "Whether the court below erred by failing independently to review the facts relating to the constitutional protection of Defendants' speech, in contravention of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)." *See* Pet. of R.J. Reynolds Tobacco Co. at i (filed Feb. 19, 2010) (No. 09-977).

II. Whether The First Amendment Applies To Fraud Actions Based On Disinterested Financial News And Commentary Is An Important And Urgent Question

Disinterested financial news reporting and commentary play a critical role in public discourse and economic activity. Immediate review is warranted because the First Amendment protections afforded by *New York Times* and *Bose* but called into question by the decision below encourage speakers to provide the public with necessary financial information.

First, as this Court has recognized, financial news and commentary about public companies facilitates efficient functioning of the markets. Publishers of financial news and commentary "ferret out and analyze information," often, as here, "by meeting with and questioning corporate officers," and "information that [they] obtain normally may be the basis for judgments as to the market worth of a corporation's securities." *Dirks v. SEC*, 463 U.S. 646, 658-59 n.17 (1983) (quotations omitted). This enhances "market efficiency in pricing" and "redounds to the benefit of investors." *Id.* at 659 & n. 17 (quoting 21 S.E.C. Docket 1401, 1406 n.18 (1981)).

Second, the public wants financial news and commentary about particular companies. With the modern day phenomenon of direct consumer investing, the need for disinterested stock market information is at an all-time high. Many people have retirement and other life-event funds invested in stocks; information relevant to these investments is of surpassing importance to these investors. *See* Pet. App. 42a ("financial news and commentary is especially important [today] because so many Americans are actively involved in trading in the securities markets and there is a high demand for information about investment opportunities"). As a result, today's news outlets are filled with financial news and commentary regarding the stock market prospects of particular public companies.

In particular, financial news and commentary often involves, as here, a writer reporting on a statement by a company representative concerning the timing of an event of economic consequence for the company. For instance:

- Financial reporters quoted statements by a company representative concerning a large acquisition, and wrote that the company "expects the deal to close by April 30." Kris Maher & Ben Casselman, *Coal Giant Consol Is Latest To Buy Gas*, Wall St. J., Mar. 16, 2010.
- A financial reporter quoted statements by a company representative concerning a "blockbuster" pharmaceutical and reported that the company expected regulatory approval soon. Thomas Gryta, *Auxilium May*

Reward Investors, Wall St. J., Oct. 21, 2009.

- Financial reporters quoted statements by a representative of American International Group Inc. that he was "confident" that a very large sale "would be completed." Serena Ng & Joann S. Lublin, *Benmosche Upbeat on AIG Prospects*, Wall St. J., Apr. 2, 2010.

The universe of financial news and commentary concerning particular public companies is extensive.[8]

Third, the current financial crisis has focused the public on financial matters as never before. The finalists for the 2009 Pulitzer Awards included the staff of the *Wall Street Journal* for "highly detailed coverage of the collapse of America's financial system, explicating key decisions, capturing the sense of calamity and charting the human toll." *See* 2009 Finalists, *available at* http://www.pulitzer.org/finalists/2009 (last visited Apr. 28, 2010). Similarly, an article in the *New York Times* was recognized "[f]or its comprehensive coverage of the economic meltdown of 2008, setting a standard for depth and sophistication while making the arcane world of finance and banking accessible to an often

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[8] *See, e.g.*, Brian Bandell, *BankUnited CEO: Big Deal is Coming*, South Florida Business Journal, Nov. 10, 2009; Rick Rothacker & Patrick Scott, *Wachovia Eyed Big Buffett Investment*, Charlotte Observer, Oct. 16, 2008, at 1A; Steven Pearlstein, *At Constellation, Not a Star Performance*, Wash. Post, Apr. 24, 2009, at A13; Vivian Marino, *Trying to Gauge the REIT Rebound*, N.Y. Times, June 21, 2009, at Bus. 14.

bewildered public." *Id.* The financial press also warned the public about the imminent crisis.[9]

The Fourth Circuit's decision withdrawing any First Amendment protections for disinterested financial news and commentary will chill necessary and useful speech. Sources often have their own financial interests at stake in financial reports, as did the source (a company employee) at issue in this case. Giving sources the power to bring a suit any time they can credibly deny making a material statement is a serious threat to financial reporting. The mere threat of a costly lawsuit, for which this case could set a precedent, would force many media outlets to avoid these types of stories altogether. This result would significantly chill journalists' ability to report on financial news and deliver information vital to the public interest in an "uninhibited, robust, and wide-open" manner. *N.Y. Times*, 376 U.S. at 270.

So too, independent appellate review of the facts that render speech unprotected is essential for reporters to safely publish financial news. As demonstrated by the opinion below, under the "clear error" standard, the factual decision crucial to protecting the speech (*i.e.* whether or not the speech was intentionally or recklessly false), is made only once, by the trial judge, and only by a preponderance of the evidence. If there is any basis at all in the record for

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[9] *See, e.g.*, Mara Der Hovanesian, *Nightmare Mortgages*, Business Week (Sept. 11, 2006); *see also* Chris Roush, *Unheeded Warnings*, American Journalism Review (December/January 2009); Dean Starkman, *Power Problem*, Columbia Journalism Review (May/June 2009) (listing over seven hundred financial press stories related to the financial crisis).

the trial judge's determination, and if the trial judge simply does not like the defendant, then the reporter has no outlet through which to appeal the factual finding and the application of law to facts underlying that decision. As with the determination of whether the defendant published something with actual malice, this factual determination is critical in determining whether or not a reporter is liable. Denying an outlet for de novo appeal of that determination would seriously undermine the free speech of journalists.

III. The Respondent Is Not Aided By The Commercial Speech Doctrine

The publications at issue cannot be stripped of First Amendment protection simply by labeling them "commercial" speech. The government argued below that the publications at issue in this case are commercial speech and so not entitled to constitutional protection.[10] The district court agreed with the government, and held that the publications "are commercial speech entitled to lesser protection under the First Amendment than [] pure speech." Pet. App. 85a. The court of appeals did not explicitly address the issue, because it concluded that whatever the nature of the speech, "[p]unishing fraud ... simply does not violate the First Amendment." Pet. App. 49a. In light of the government's position below, *amicus* addresses here the question of whether the Fourth Circuit's decision can be saved by invoking the commercial speech doctrine. It cannot.

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[10] *See, e.g.*, Br. of SEC at 48 & n.8, *SEC v. Pirate Investor LLC* (4th Cir. 2009) (No. 08-1037).

1. Commercial speech is that which "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (quotation omitted); *id.* at 778 (Stewart, J., concurring). To clarify that definition, this Court in *Bolger v. Youngs Drug Products Corp.*, articulated three necessary characteristics of commercial speech: (1) that the speech be an "advertisement," (2) that the speech makes "reference to a specific product," and (3) that the speaker "has an economic motivation." 463 U.S. 60, 66-67 (1983). None of these factors is sufficient by itself for a finding of commercial speech; only "[t]he combination of all these characteristics" provides support for classifying speech as commercial. *Id.* at 67.

It follows that disinterested financial commentaries, including reports, projections, and opinions about a marketable security, are not commercial speech. As this Court stated in *Lowe v. SEC*, 472 U.S. 181 (1985), "because we have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment, it is difficult to see why the expression of an opinion about a marketable security should not also be protected." *Id.* at 210 n.58 (citing *Bose*, 466 U.S. at 513). Accordingly, the courts of appeals have consistently held that financial commentary is fully protected by the First Amendment. *See, e.g., SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 371-73 (2d Cir. 1988) (holding that articles in *Stock Market Magazine* that portrayed firms as appealing investment prospects were not commercial speech); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998) (holding that a *Forbes* magazine article urging readers to sell overvalued stock was constitutionally

protected); *United States v. Wenger*, 427 F.3d 840, 848 (10th Cir. 2005) (reiterating that "disinterested investment advice" qualifies "for full First Amendment protection").

2. Under this established precedent, the USEC Special Report is not commercial speech. The Report is no different than an article reviewing the sound quality of loudspeakers or a financial magazine commenting on the strengths and weaknesses of a public company. These publications may ultimately lead to a commercial transaction, if the reader acts on the opinion provided and purchases a loudspeaker or a stock. But while the speech refers to a specific product (*i.e.*, the stock described) it is not an advertisement and the speaker has no economic motivation related to the product.

The Super Insider Tip E-mail, even though it is promotional, also is not commercial speech. The "product" that the E-mail advertises—the Special Report—is itself protected speech. When the product being advertised is itself protected speech, the advertisement should not be classified as commercial. A contrary result—which would protect statements and opinions about stocks when they appear in reports, investment newsletters and financial news articles, but strip that protection when those statements are reprinted in advertisements or promotional materials—would undermine the significance of the First Amendment. Excerpts from a new novel appearing on an author's website should not receive lesser protection than the book itself. A preview of a documentary film should not receive lesser protection than the film itself.

Courts confronting these circumstances have properly recognized that an advertisement for non-commercial speech is not commercial speech. In *National Life Insurance Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627 (D. Md. 1992), the court held that a financial analyst's promotional materials advertising a newsletter could not be classified as commercial speech. The court held that such a "broad definitional sweep would, if applied without further thought, transform too much noncommercial speech into commercial statements." *Id.* at 643. The fact that some of the contested statements happened to appear in promotional materials as well as in the newsletter did not make them commercial speech. "Such a fortuity should not transform the character of their content into commercial speech, just as the quality of wine does not depend on the shape of the vessel in which it is carried." *Id.* at 644.[11]

Moreover, under this Court's decision in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988), the promotion is so intertwined with the Report itself that it cannot be left unprotected. In that case, the Court explained

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[11] The court in *Lane v. Random House*, 985 F. Supp. 141 (D.D.C. 1995), applied similar reasoning to an advertisement for a book about the Warren Commission and the Kennedy assassination. The court held the advertisement was not commercial speech and so was entitled to full First Amendment protections. That was because "the underlying product is a book" and "it is essential to identify and protect advertising which summarizes an argument or opinion contained in the book." *Id.* at 152 (internal quotations omitted). As the court explained, "the challenged advertisement is not about laundry detergent; it cannot be divorced from the book ... and the book is protected speech." *Id.*

that proposals of economic transactions in the form of charitable solicitations are not commercial speech where "the component parts of a single speech are inextricably intertwined," so that the Court "cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* Even though the solicitations were, in part, commercial proposals, the Court still "appl[ied] our test for fully protected expression." *Id.* In this case, the tip E-mail was "inextricably intertwined" with the Special Report: it summarized and paraphrased the contents of that report. Although some phrases in the e-mail proposed a commercial transaction, it would be "artificial and impractical" to therefore strip the entire document of First Amendment protections.

3. Classifying financial reporting or opinion commentaries as commercial speech would have grave consequences. It would render the thousands of television programs, magazines, newspaper columns, newsletters, books, and websites that provide financial reporting without the protections of the First Amendment. At a time of enormous financial uncertainly and upheaval in the journalism industry, writers and publishers need to be able to advertise their work and entice readers to consume it. Eliminating full constitutional protection for promotion of speech would deter journalists and publishers from working to distribute their speech to a broader audience. For these reasons, the Court should reaffirm that publications like the Special Report and E-mail are not commercial speech.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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